80-6034

NO.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EUGENE WILLIAM GALL, JR. PETITIONER

vs.

COMMONWEALTH OF KENTUCKY RESPONDENT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Eugene William Gall, Jr., who is now held in the State Penitentiary at Eddyville, Kentucky, asks leave to file the attached Petition for a Writ of Certiorari to the Kentucky Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

Erwin W. Lewis

ERWIN W. LEWIS
ASSISTANT PUBLIC ADVOCATE
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

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EUGENE WILLIAM GALL, JR.,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

AFFIDAVIT

I, Eugene William Gall, Jr., being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs of fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I am not employed. I have no other sources of income.

5. I have no savings accounts. I do not own any valuable property.

6. I am presently incarcerated at the Kentucky State Penitentiary at Eddyville, Kentucky.

Further the affiant saith not.

Eugene William Gall, Jr.
EUGENE WILLIAM GALL, JR.

Duly witnessed and sworn
to before me, a notary public,
this 16 day of October, 1980.

Notary Public, Commonwealth of Kentucky
My Commission expires: June 4, 1982

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OCTOBER TERM, 1980

EUGENE WILLIAM GALL, JR. PETITIONER

Supreme Court, U.S.
FILED
JAN 12 1981
MICHAEL RODAK, JR., CLERK

vs.

COMMONWEALTH OF KENTUCKY RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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January 12th, 1981

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A VENIREMAN MAY BE EXCLUDED FOR CAUSE IN A CAPITAL CASE DUE TO HIS STATEMENT THAT HE IS NOT SURE IF HE CAN VOTE TO IMPOSE THE DEATH PENALTY?

II.

WHETHER THE IMPROPER EXCLUSION OF A VENIREMAN FOR CAUSE UNDER WITHERSPOON V. ILLINOIS IS RENDERED HARMLESS BEYOND A REASONABLE DOUBT BY THE EXISTENCE OF ONE UNUSED PROSECUTORIAL PEREMPTORY CHALLENGE?

III.

WHETHER BLOOD, HEAD HAIR, PUBIC HAIR AND SALIVA SAMPLES CAN BE SEIZED FROM A DEFENDANT FOR TESTING TO DETERMINE IMMUTABLE CHARACTERISTICS BASED ONLY ON THE NON-FACTUAL REPRESENTATION THAT THEY WERE NEEDED TO COMPLETE THE INVESTIGATION OF A RAPE AND MURDER?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EUGENE WILLIAM GALL, JR. PETITIONER

vs.

COMMONWEALTH OF KENTUCKY RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

The petitioner, Eugene William Gall, prays that a writ of certiorari issue to review the judgment of the Kentucky Supreme Court issued on September 2, 1980 and modified on October 14, 1980.

OPINION BELOW

The opinion of the Kentucky Supreme Court was entered on September 2, 1980. The Court overruled a petition for rehearing, and modified the original opinion, on October 14, 1980. A "corrected page" was "issued" on December 9, 1980. Copies of the opinion and the modifications are attached as a part of the appendix.

JURISDICTION

The opinion of the Kentucky Supreme Court was entered on September 2, 1980. A timely petition for rehearing was overruled on October 14, 1980, with an order entered modifying the initial opinion. Mr. Justice Stewart extended the time for filing a petition for writ of certiorari to and including January 12, 1981. The jurisdiction of this Court is invoked under 28 USC §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

One of the constitutional provisions involved is the due process clause of the Fourteenth Amendment to United States Constitution, which provides, in part that, "...nor shall any

State deprive any person of life, liberty, or property, without due process of law...."

Also involved is the Sixth Amendment to the United States Constitution, which provides, in part, that "[i]n all criminal prosecutions the accused shall enjoy the right to... an impartial jury of the State...."

The final constitutional provision involved is the Fourth Amendment to the United States Constitution, which provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

Petitioner, Eugene William Gall, Jr., was arrested on the morning of April 5, 1978, on suspicion of having committed an armed robbery in a Gardnersville, Kentucky grocery store. On April 27, 1978, he was indicted by a Boone County grand jury for the April 5th murder of Lisa Jansen, a young girl (TR 1).

That same day, at arraignment, the Commonwealth moved to obtain physical samples of Gall's head and pubic hair, saliva, and blood (Transcript of the Arraignment 3-5; A 70-72; TR 5-6; A 66-67).

Two boilerplate affidavits were attached to the Commonwealth's motion (TR 19, 20; A 68, 69). The affidavit of Kentucky State Police Detective Jerry Keith stated three things: 1) the Commonwealth needs the samples "for purposes of completing their [sic] investigation into the alleged rape and death of Lisa Jansen"; 2) "the investigation and the ends of justice cannot be served without the above-mentioned items because of the nature of the alleged offenses of rape and murder," and 3) "the purpose of obtaining these items is not to harass or to intimidate the defendant." (TR 19; A 68). The affidavit of the Commonwealth Attorney was identical in wording to the Detective's. (TR 20; A 69).

At the hearing, the defense attorney objected because he did not believe "the Affidavits attached are sufficient under the law to impel the Commonwealth to some of these samples...." (Transcript

of Arraignment 4; A 71). The attorney for Gall had no objection to the taking of saliva, hair and fingerprint samples, but did have objections to blood sampling because the "Affidavits do not show a reason why that they would like these samples. There is nothing other than the fact that the reason is that they need the samples to complete their investigation. We don't believe that this is sufficient." (Transcript of Arraignment 5; A 72).

In response the Commonwealth Attorney stated, "the Commonwealth believes that no cause need be shown except they supply the Affidavits for the record. It is simply in the nature of physical evidence...." Id.

The trial judge granted the Commonwealth's requests. (TR 21-22; A 73-74).

Gall was tried during the third and fourth weeks of September, 1978. Because he was charged with a capital offense, the Commonwealth was allowed to exclude certain veniremen for cause due to their attitudes toward the death penalty. One of the persons excluded, toward the end of voir dire, was a man by the name of David Correll.

Correll stated, when first confronted with the fact that he was being considered as a juror in a death penalty case, that he thought he could "listen to the evidence and base [his] judgment on what [he heard] in the courtroom (TE 964; A 47). When asked if he had any feelings about recommending the penalty of death, he said "[n]ow religiously I might, yes" (TE 965; A 48). Correll was "not sure" if he agreed with the legislature's decision to pass a death penalty statute, nor was he sure if his "religious scruples" would prevent him from imposing the death penalty in any case (TE 966; A 49).

When asked if he was "open to the imposition of the death penalty, should the facts warrant it?", Correll stated, "Maybe, yes" (TE 967; A 50). He went on to say that his mind was not "closed" to the imposition of the death penalty, and that it was "very possible" that the death penalty would be appropriate in a heinous case (Id.). Correll assured the Court that he could follow the law as contained in the instructions (TE 968; A 51).

Notwithstanding these assurances, the Commonwealth's Attorney and the trial court continued to press Correll regarding

his feelings about the death penalty. Correll, throughout the latter portion of his voir dire, continued to display his ambiguity toward the ultimate punishment, stating at one point that "there might be situations where [he] might feel like "imposing the death penalty, and stating at another point that he was truly uncertain about his feelings" (TE 970-976; A 53-59). Finally, the trial court excluded Correll for cause (TE 976; A 59).

Gall was tried and convicted of murder by the jury, notwithstanding his plea of not guilty by reason of insanity. A presentence hearing was held following the verdict, after which the jury came back with a recommendation of death by electrocution (TE 2200). The trial court agreed with this recommendation, and sentenced Gall to death (TE 2208).

Gall appealed his conviction and sentence to the Kentucky Supreme Court. Among the issues raised to that Court were the improper exclusion of two jurors for cause due to their attitudes toward the death penalty, in violation of the Sixth and Fourteenth Amendments, and the improper seizure of body samples, in violation of the Fourth Amendment. Counsel supplemented Gall's original brief with, among other things, a briefing on this Court's decision in Adams v. Texas, ___ U.S. ____, 100 S.Ct. 2521 (1980).

The Kentucky Supreme Court affirmed Gall's final judgment on September 2, 1980, thereafter issuing the mandate and modifying its opinion on October 14, 1980. Gall v. Commonwealth, Ky., ____ S.W.2d ____ (1980) (A 1-41). With no explanation, a "corrected page" was issued by the Court on December 9, 1980 (A 43).

In its opinion, the Court held that David Correll's exclusion for cause was not a violation of this Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), and Adams v. Texas, supra, saying that "if a prospective juror will not say whether he can or cannot consider without prejudice the options from which he must choose in arriving at a verdict, he should be disqualified" Gall at 9 (A 9).

The Kentucky Supreme Court further considered the impact of this Court's ruling in Adams v. Texas. The Court held that Adams did not apply to the facts of the Gall case, stating that "[t]here is, however, a dispositive distinction, we feel, between a prospective juror who admits he may be affected by the death penalty, or does not know

whether he would or would not, and one who is unable to say even that he can consider that option. It is our opinion, therefore, that Adams does not apply to this case, and that Witherspoon does not require the acceptance of a juror who is unable to say that he can exercise an open-minded discretion with regard to the vital issues he will be called upon to decide." Gall at 11 (A 11).

The Court further held that because the Commonwealth had used only six of its seven peremptory challenges, that if Correll's exclusion was erroneous, that the error was harmless. "Surely, had the trial court denied its motion to strike Correll for cause, it would have used that challenge. Under similar circumstances the Supreme Court of Georgia held possible Witherspoon errors to have been harmless. Alderman v. State, Ga., 246 S.E.2d 642 (1978). See also State v. George, La., 346 So.2d 694 (1977). We reach the same conclusion in this case." Gall at 11-12 (A 11-12).

Finally, the Court reached Gall's Fourth Amendment claim, holding that:

> In this instance the trial court had before it an indictment charging Gall with the murder of Lisa Jansen and affidavits by the Commonwealth's Attorney and a detective of the Kentucky State Police stating that the physical samples were needed "for purposes of completing their investigation into the rape and death of Lisa Jansen." It seems to us that the relevance and importance of such evidence in a case involving rape are self-evident. We therefore hold that the order granting permission to obtain it from Gall's person was reasonable and was a valid basis for the subsequent admission of testimony derived from its analysis. Cf. Thompkins v. State, Ind., 383 N.E.2d 347, 351 (1979).
> Gall at 5 (A 5) (Emphasis added).

REASONS FOR GRANTING WRIT

I.

THE DECISION BELOW HOLDING THAT AN UNCERTAIN VENIREMAN MAY BE EXCLUDED FOR CAUSE CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT.

Since 1968, this Court has made it clear under what circumstances a venireman may be excluded for cause due to his feelings about the death penalty. The only veniremen who may be excluded are:

> ...those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968).

This two-pronged test has been applied consistently by this Court in subsequent cases. Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, ___ U.S. ____, 100 S.Ct 2521 (1980).

The touchstone of this history of case law is that the venireman make it "unmistakably clear" that his opposition to capital punishment reaches the prohibited level. In the instant case, however, the Kentucky Supreme Court has abandoned the "unmistakably clear" standard established by this Court. In its place, the Kentucky Supreme Court has held that a venireman may be excluded where he is unsure how he feels about the death penalty.[1]

> It occurs to us that if a prospective juror will not say whether he can or cannot consider without prejudice the options from which he must choose in arriving at a verdict, he should be disqualified... [T]he effect of such equivocation is that on this important issue the juror will not give an assurance that he is able to exercise any discretion because he is not sure that his mind is open at the beginning. Gall at 9 (A 9).

This Court should grant this petition for a writ of certiorari to clarify what is obviously a deep conflict between this Court's decisions and the decision by the Kentucky Supreme Court. This Court should grant review in order either to reaffirm the standard established in Witherspoon v. Illinois of requiring

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[1] It should be noted that the venireman involved in this case, David Correll, went no further in his opposition to capital punishment than equivocation and uncertainty. Indeed, at various places in the voir dire, Correll made it clear that his uncertainty would not keep him from considering capital punishment. For example, he answered "Maybe, yes" to the question of "are you open to the imposition of the death penalty, should the facts warrant it?" (TE 967; A 50). When asked, "Is your mind in any way closed to the imposition of the death penalty?", Correll answered, "No, I would say it isn't closed, but it - I am just undecided" (Id.). The entire transcript of Correll's voir dire is included in the appendix. (A 44-59).

unmistakable clarity of the venireman's opposition to capital punishment prior to exclusion for cause, or to broaden the basis for exclusion to uncertainty about the death penalty as did the Kentucky Supreme Court.[2]

The conflict created by the Kentucky Supreme Court is further revealed not only in changing the "unmistakable clarity" standard to include that of the uncertain venireman. It is also apparent in the Kentucky Supreme Court's treatment of Adams v. Texas, ___ U.S. ____, 100 S.Ct. 2521 (1980). In Adams v. Texas, this Court rejected an attempt to construct an additional qualification for jurors in capital cases. This Court held that Texas could not go beyond the test erected in Witherspoon v. Illinois.

The Kentucky Supreme Court, in a rather subtle way, has attempted to follow the Texas lead. They have held that to be a juror in a capital case the venireman must affirmatively state that he can impose the death penalty, erecting a test for juror qualification, as opposed to Witherspoon's test of juror exclusion. This is a state standard broader than that established in Witherspoon v. Illinois, and is thereby directly in conflict with this Court's decision in Adams v. Texas.

In summary, the Kentucky Supreme Court has held that an uncertain juror may be excluded for cause in a capital case. This holding conflicts with a line of prior decisions of this Court allowing only those jurors who state their opposition to capital punishment with unmistakable clarity to be excluded for cause. Further, the holding of the Kentucky Supreme Court conflicts with Adams v. Texas, ___ U.S. ____, 100 S.Ct. 2521 (1980) by erecting

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[2]This Court has never ruled specifically that an uncertain venireman cannot be excluded for cause under Witherspoon v. Illinois. However, in a number of cases this Court has had this precise issue before it and has reversed the lower court in summary fashion. The clearest example occurred in State v. Mathis, 52 N.J. 238, 245 A.2d 20 (1968), rev'd, 403 U.S. 946 (1971). There, one of three veniremen discussed by the Court stated when asked if he could vote to impose the death penalty that "I can't definitely say I could or I couldn't." State v. Mathis, 245 A.2d at 26. This Court reversed. See also Ladetto v. Commonwealth, 356 Mass. 541, 254 N.E.2d 415 (1969), rev'd. 403 U.S. 947 (1971), and State v. Adams, 76 Wash. 2d 650, 458 P.2d 558 (1969), rev'd. 403 U.S. 947 (1971).

a state standard of jury exclusion that is broader than the constitutional standard erected in Witherspoon v. Illinois. Accordingly, this Court should grant this petition for a writ of certiorari to the Kentucky Supreme Court.

II.

THE DECISION BELOW HOLDING THAT AN UNCERTAIN VENIREMAN MAY BE EXCLUDED FOR CAUSE CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

State courts other than Kentucky's have remained consistent with this Court's holding in Witherspoon v. Illinois, 391 U.S. 510 (1968). In People v. Goodridge, 76 Cal. Rptr. 421, 452 P.2d 637 (1969), a venireman was asked whether her opposition to capital punishment would disable her from rendering a verdict. The venireman responded, "'I really don't know. I'm on the fence. I just don't know. I have never had to make a decision like this before, and it is bothering me'". People v. Goodridge, 452 P.2d at 647. The Court held that "[s]uch a response clearly does not indicate that she could never vote to impose the death penalty no matter what the facts of the case might reveal. Much more in the way of an expression of opposition to the death penalty would be required from Mrs. Freeman for us to sustain her dismissal from the jury for cause." Id., at 647. A similar result has been reached in at least two other state courts. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); People v. Washington, 80 Cal. Rptr. 567, 458 P.2d 479 (1969).

The Kentucky Supreme Court decision, however, is consistent with the decisions of other state's appellate courts. State v. Ross, La., 343 So.2d 722 (1977); Williams v. State, Fla., 228 So.2d 377 (1969), vac., 408 U.S. 941 (1972); Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978), cert. den. ____ U.S. ___, 99 S.Ct. 593 (1978).[3]

This Court should review the decision of the Kentucky Supreme Court due to the directly conflicting holdings of the

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[3]In September, 1980, the United States Federal District Court for the Southern District of Georgia granted a petition for the writ of habeas corpus. Alderman v. Austin, ____ F. Supp. _____ (S.D.Ga. 1980).

different state courts of last resort on this precise interpretation of Witherspoon v. Illinois. As long as this Court has not specifically treated this precise issue, this disparity between state appellate courts can be expected to continue. Jury selection in capital cases is too important to permit a variance on this Court's unambigious holding.

III.

THE DECISION BELOW HOLDING THAT AN UNUSED PROSECUTORIAL PEREMPTORY CHALLENGE RENDERS A WITHERSPOON VIOLATION HARMLESS ERROR INDIRECTLY CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The Kentucky Supreme Court resorted to an alternative holding regarding the exclusion of the venireman, David Correll. It stated:

> It will be recalled that the Commonwealth left one of its peremptory challenges unexercised. Surely, had the trial court denied its motion to strike Correll for cause, it would have used that challenge. Under similar circumstances the Supreme Court of Georgia held possible Witherspoon errors to have been harmless. Alderman v. State, Ga., 246 S.E.2d 642 (1978). See also State v. George, La., 346 So.2d 694 (1977). We reach the same conclusion in this case.
> Gall at 11-12 (A 11-12).

This Court has never rendered a decision squarely in conflict with the holding of the Kentucky Supreme Court. However, there have been many summary reversals by this Court where the state court below held any Witherspoon error to have been harmless due to the existence of unexercised peremptory challenges in the hands of the prosecution. Whan v. State, Tex., 438 S.W.2d 918 (1969), rev'd., 403 U.S. 946 (1971); People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968), rev'd. 403 U.S. 946 (1971); State v. Mathis, 52 N.J. 238, 245 A.2d 20 (1968), rev'd, 403 U.S. 946 (1971); State v. Adams, 7 Wash. 2d 650, 458 P.2d 558 (1969), rev'd., 403 U.S. 947 (1971); State v. Wigglesworth, 18 Ohio St. 2d 171, 248 N.E.2d 607 (1969), rev'd., 403 U.S. 947 (1971). These decisions indicate indirectly that the Kentucky Supreme Court's decision is not consistent with this Court's interpretation of Witherspoon v. Illinois.

Further, in this Court's decision in Davis v. Georgia, 429 U.S. 122, 123 (1976) (Rehnquist, J., dissenting), it is noted

that in that case it is "unclear whether the state was entitled to another peremptory challenge." Notwithstanding that fact, this Court reversed the death sentence based upon a violation of Witherspoon. This reversal caused the dissent to observe that that case establishes a "per se rule that precludes application of even the harmless error test of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)." 429 U.S. at 123.

Admittedly, neither Davis v. Georgia nor the summary reversals noted above establish weighty authority that the harmless error analysis is inapplicable to a Witherspoon violation. Yet, whatever meaning can be rendered from these actions indicate that this Court has not been receptive to the harmless error rule as applied to Witherspoon violations.[4] Because the decision below is in conflict with this implicit attitude, this Court should review the decision of the Kentucky Supreme Court.

IV.

THE DECISION BELOW HOLDING THAT AN UNUSED PROSECUTORIAL PEREMPTORY CHALLENGE RENDERS A WITHERSPOON VIOLATION HARMLESS ERROR CONFLICTS WITH A NUMBER OF PRIOR DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

A number of state appellate courts have ruled contrary to the Kentucky Supreme Court's decision holding that an unused prosecutorial peremptory challenge renders a Witherspoon violation harmless beyond a reasonable doubt.

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[4]Three lower federal courts apparently agree with this analysis of this Court's decision. Barlow v. Wainwright, 323 F.Supp. 829 (N.D. Fla. 1971) stated that the use of the harmless error analysis "overlooks the very design of Witherspoon which proscribes exclusion of a venireman for cause if he is opposed to capital punishment... This Court will not join in this kind of imprecise speculation and in nowise intimates any view as to the correctness of that argument." Id., at 832. The Fifth Circuit's case of Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), aff'd en banc 626 F.2d 396 (5th Cir. 1980) does not deal directly with the harmless error problem. However, the Court does note in the opinion that the "state used only 13 of its 15 peremptory challenges." Finally in reviewing Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978), cert. den. 439 U.S. 991 (1978), reh. den. 439 U.S. 1122 (1979), on habeas corpus, the United States District Court for the Southern District of Georgia rejected the Georgia Supreme Court's analysis finding a Witherspoon violation to be harmless when the prosecution has unused peremptory challenges. "[T]his Court must note that the State's argument cannot amount to more than mere supposition. Witherspoon, of course, requires that exclusions be based on the unambiguous and explicit, not a mere hypothesis that the prosecutor would use his challenges because to do otherwise would have been unwise or unlikely." Alderman v. Austin, ___ F. Supp. ____ (S. D. Ga. 1980).

In In Re Anderson, 73 Cal. Rptr. 21, 447 P.2d 117 (1968), the California Supreme Court states that while Witherspoon v. Illinois itself says nothing about this question, that "the broad language of the opinion establishes without doubt that in no case can a defendant be put to death where a venireman was excused for cause solely on the ground he was conscientiously opposed to the death penalty" notwithstanding the presence of unused prosecutorial peremptory challenges." In Re Anderson, 447 P.2d at 122. This holding was recently reaffirmed by the California Supreme Court in People v. Velasquez, 102 Cal. Rptr. 306, 606 P.2d 341 (1980), vac. ____ U.S. ____, 65 L.Ed.2d 1132 (1980).

The same decision was reached on September 17, 1980 in Pierson v. State, Tex., ___ S.W.2d ____ (1980). There, the Court rejected the state's harmless error argument, among other reasons, because "it would be pure speculation on our part."

This Court should review this question due to the irreconciliable differences between the appellate courts of different states on this vital constitutional matter.

V.

THE QUESTION OF WHETHER AN UNUSED PROSECUTORIAL PEREMPTORY CHALLENGE IS HARMLESS IS ONE OF VITAL IMPORT TO THE ADMINISTRATION OF JUSTICE IN THE STATES.

Petitioner submits that review and final settlement of this question by this Court is warranted due to its importance to the states' criminal justice systems. This is so because prosecutors in states adopting the harmless error rule can be expected to begin reserving peremptory challenges in capital cases in order to thwart any future judicial finding of a Witherspoon violation.[5] Such action would inhibit this Court's efforts to enforce its decision in Witherspoon, and would further threaten the integrity of the prosecution of cases throughout the many states where capital punishment is now a reality.

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[5]This is not a cynical or unwarranted prediction. Following the Kentucky Supreme Court's ruling in the instant case, petitioner filed a petition for rehearing. In that petition, the Court was reminded that prosecutors would in the future save peremptory challenges in capital cases to trigger the harmless error rule. The petition for rehearing was denied. Only a short time later, petitioner became aware that prosecutors all across Kentucky were being told by the Attorney General's office to save a peremptory challenge in capital cases. An Assistant Attorney General's memorandum to this effect was attached to a motion to supplement the record filed in the Kentucky Supreme Court. This motion was denied. The memorandum, however, has been made a part of the appendix attached to this petition. (A 60-65).

Further, unless this Court decides this question, unnecessary ambiguity will have been injected into the selection of jurors in capital cases. While no one would seriously contend that Witherspoon is a simple matter to interpret at the trial level, allowing the harmless error rule to attach to "death-qualifying" jurors would only further complicate matters. This Court has admirably enforced the two prongs of the Witherspoon test over the past decade. Trial courts need to know that the established clarity of Witherspoon is not now to be muddied by appellate decisions finding ways around the requirements of Witherspoon. For these reasons, petitioner urges this Court to review this question.

VI.

THE DECISION BELOW, HOLDING THAT THE RELEVANCE AND IMPORTANCE OF THE PHYSICAL SAMPLES WERE SELF-EVIDENT AND THEREFORE PROPERLY SEIZED, CONFLICTS WITH THE PREVIOUS DECISIONS OF THIS COURT.

There is no dispute that upon a proper factual showing it is constitutional to "extract" blood, saliva, head and pubic hair samples.[6] Schmerber v. California, 384 U.S. 757 (1966). Absent evanescent evidence, a search which intrudes beyond the surface of the body can only be conducted when there is a factual demonstration that there is a "clear indication" that the evidence will be found:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.
> Id. at 769-770, 86 S.Ct. at 1835.

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[6]Even though defense counsel objected to the seizure of only the blood of Eugene Gall, the impropriety of the seizure of the hair and saliva samples is reviewable by this Court even under Wainwright v. Sykes, 433 U.S. 72 (1972) restrictions since this is a capital case and Kentucky has a recognized exception to the contemporaneous objection rule for cases in which the sentence is death. Miller v. North Carolina, 583 F.2d 701, 705 (4th Cir. 1978); Smith v. Commonwealth, 290 S.W.2d 814 (Ky. 1956); Bowman v. Commonwealth, 290 S.W.2d 814 (1956); Edwards v. Commonwealth, 182 S.W.2d 948 (Ky. 1944).

Since the characteristics of the blood, hair and saliva samples for which the prosecution desired to test in this case are not subject to change or disappearance, there had to be a proper factual showing to allow their extraction under a warrant or judicial order.

The supporting affidavits did not show "a clear indication that in fact such evidence will be found" Id. The affidavits of the Detective and the Commonwealth Attorney stating that the samples were needed for purposes of completing their investigation failed to make any factual showing at all, let alone a factual showing meeting the Schmerber "clear indication" standard.

Not one fact, not one "underlying circumstance" was recited in the affidavits. Without such detailing of the factual circumstances, the court cannot perform its detached function. United States v. Ventresca, 380 U.S. 102, 108-09 (1965).

Contrary to the determination of the Kentucky Supreme Court in this case, Gall at 5 (A 5), the existence of an indictment does not supply the required factual showing to justify the seizure of blood, hair and saliva samples:

> While the existence of the indictments in this case might as a matter of law furnish probable cause to believe that on May 13, 1971 the Fidelity Bank of Folcroft was robbed by two men with handguns, and that defendants were those two men, it nowhere establishes that the requested blood, hair or X-rays are evidence of that crime. This must be done by affidavit before a warrant can issue. The Government's motion as drafted contains only conclusory allegations of insufficient detail to establish probable cause. It is based entirely on heresay but contains no surrounding facts and circumstances from which the conclusions given were drawn, and no chain of information establishing the source of the information or the reliability of that source.
> United States v. Allen, 337 F.Supp. 1041, 1044 (E.D. Pa. 1972).

The use of the indictment to supply the factual basis for the affidavit would be in violation of the defendant's constitutional presumption of innocence, Taylor v. Kentucky, 436 U.S. 478 (1978), guaranteed him prior to trial. Cf. United States v. Haskins, 345 F.2d 111, 114 (6th Cir. 1965).

The affidavits did not set forth particular facts and circumstances to demonstrate probable cause and to allow the

magistrate to make an independent evaluation. See Franks v. Delaware, 438 U.S. 154, 165 (1978); Spinelli v. United States, 393 U.S. 410 (1969); Anguilar v. Texas, 378 U.S. 108 (1964).

Because the Supreme Court of Kentucky's ruling is in conflict with the applicable constitutional holdings of this Court, review should be granted.

VII.

THE DECISION BELOW, HOLDING THAT THE RELEVANCE AND IMPORTANCE OF THE PHYSICAL SAMPLES WERE SELF-EVIDENT AND THEREFORE PROPERLY SEIZED, CONFLICTS WITH THE DECISIONS OF OTHER COURTS.

Federal and state courts other than Kentucky have determined that, absent a proper factual showing, the seizure of physical samples which intrude beyond the surface of the body and which have immutable characteristics is a violation of the fourth amendment in line with this Court's holding in Schmerber v. California, 384 U.S. 757 (1966).

In United States v. Allen, 337 F. Supp. 1041 (E.D. Pa. 1972) the Court held that the motion to obtain body samples of the defendant was insufficient because if failed to satisfy the fourth amendment requirements of a sufficient factual demonstration for the issuance of the warrant. Id. at 1044.

In Mills v. State, 345 A.2d 127 (Md.Ct.Sp.Ap. 1975) aff'd. 363 A.2d 491 (Md.Ct.App. 1976) the state requested prior to trial to have a sample of the defendant's blood since "in order...to go forward with certain evidence...it is necessary to obtain a blood sample from the defendant to determine his blood group....as necessary corroboration to other scientific evidence." Id. at 129. The sample was ordered taken. While the case was affirmed because appellant first brought the matter out on cross-examination, the Court held that the withdrawal of the blood was "...violative of the appellant's constitutional rights...." Id. at 132.

There were sufficient facts to support a finding of probable cause detailed in the prosecutor's affidavit to make the seizure of the hair and blood samples constitutional in People v. Marshall, 244 N.W.2d 451, 458 (Mich. Ct.App. 1976). The facts set out in the affidavit included: strands of hair were found on the night clothes of one of the victims, not belonging to any of the victims, which tests disclosed as relaxed Afro hair; defendant

spent much time at a particular barber shop which performed this hair process; the suspect was left-handed, no forced entry into the house was made; that the suspect had a history of assaultive behavior; the defendant's statements of being at home at the time of crime were false; and the defendant was the son of the victim. Id. at 453, 458.

The particularized factual showing of the prosecution's affidavit in Marshall was wholly absent from the Commonwealth's affidavits in Gall's case. See also 2 LaFave, Search and Seizure, §4.1(d)(1978).

This Court should review this error because of the conflict between Kentucky authority and that of other jurisdictions, and because of the critical nature of this type of evidence in a capital case of totally circumstantial evidence.

VIII.

THE DECISION BY THE KENTUCKY SUPREME COURT DETERMINING THAT THE BODY SAMPLES WERE PROPERLY SEIZED SHOULD BE REVIEWED BY THIS COURT BECAUSE OF THE LIMITATIONS OF HABEAS REVIEW IN FEDERAL COURTS DUE TO STONE V. POWELL.

The Kentucky Supreme Court determined that the blood sample was properly seized. This Court should review this determination in this capital case because other federal forums are closed to Eugene Gall under Stone v. Powell, 428 U.S. 465 (1976). The Kentucky Supreme Court did not determine whether the saliva and hair samples were properly seized because there was no objection to this action by the trial defense counsel. This Court should substantively review these seizures since otherwise substantive review is foreclosed to petitioner.[7]

Defense counsel failed to use the opportunity to litigate all of petitioner's fourth amendment claims in the state trial court. They were litigated at the state appellate level. Under

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[7]This argument is viable only should this Court discount petitioner's position that this error is reviewable absent traditional preservation because of Kentucky's exception for capital cases. See Argument V, supra, fn.1.

Stone v. Powell, 428 U.S. 465 (1976) petitioner is precluded from federal review except by this Court. "The remedy for error in the state courts is by way of writ of certiorari to the Supreme Court of the United States." United States ex rel Maxey v. Morris, 591 F.2d 386, 389-390 (7th Cir. 1979); see also Duncantell v. Texas, 439 U.S. 1032, (1978) (Brennan, J. dissenting); Mincey v. Arizona, 437 U.S. 385 (1978) (Marshall, J. concurring); Stone, supra, 428 U.S. 495, n.38.

Stone is grounded on two basic positions: 1) state courts will competently consider and protect federal constitutional rights, and 2) the cost of the exclusionary rule outweighs its benefits.

These two policy considerations are not applicable to petitioner's case since in Stone the prisoners did receive review by the state court. Here petitioner has not received review on three aspects of his error. "The authoritative view remains that it is worth the social costs for law enforcement officers to know that someone will measure their behavior against the fourth amendment." O'Berry v. Wainwright, 546 F.2d 1204, 1221 (5th Cir. 1977) (Goldberg, J., dissenting).

The Kentucky Supreme Court, according to one of its own members, has yet to become particularly sensitive to the fourth amendment claims presented to it. Collins v. Commonwealth, Ky., 574 S.W.2d 296, 298, n. 1 (1978) (Lukowsky, J., dissenting); see also Rawlings v. Commonwealth, Ky., 581 S.W.2d 348, 351 n.6 (1979) (Lukowsky, J., dissenting). Furthermore, the appellate courts of Kentucky are given no incentive to become more sensitive with respect to a fourth amendment violation due to this Court's decision in Wainwright. Cf. Relford v. Commonwealth, Ky.App., 558 S.W.2d 175 (1977); dis. rev. improvidently granted, 556 S.W.2d 154 (1978).

Without review by this Court, where is the one level of enforcement of the exclusionary rule which Stone concludes necessary for society to foster? The Kentucky Supreme Court refused to review every aspect of this fourth amendment claim. This Court must review this issue since it conflicts with a prior decision of this Court, since it is of considerable importance to the administration of criminal justice, since there may be no other federal forum, and since this is a capital case with its conviction and sentence resting

solely on circumstantial evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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